UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

JOHN E. COX, III,		
Plaintiff	***)***	
v.	***)***	
	)	***Civil No. 03-97-P-H***
MAINE STATE POLICE, et al.,	***)***	
Defendants	***)***	

MEMORANDUM DECISION ON DEFENDANTS' MOTION TO STRIKE AND RECOMMENDED DECISION ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants the Maine State Police ("MSP"), John R. Hainey and the Oxford County District Attorney's Office ("DA's Office") (collectively, "State Defendants") seek summary judgment as to all counts against them in this action arising from the May 9, 2001 arrest of plaintiff John E. Cox, III, on drug-trafficking charges. *See* Amended Motion for Summary Judgment by the State of Maine Defendants, Maine State Police, Trooper John R. Hainey and the Oxford County District Attorney's Office ("Defendants' S/J Motion") (Docket No. 19) at 1-2; Amended Complaint and Jury Trial Demand ("Complaint"), attached as Exh. 6 to Petition & Notice of Removal of Defendants ("Removal Notice") (Docket No. 1), ¶ 10.[1] Incident thereto, the State Defendants seek to strike certain portions of Cox's

[1] The Complaint also named as defendants the State of Maine, the Norway Police Department, the Town of Norway, Oxford County and the Oxford County Sheriff's Department. *See* Complaint ¶¶ 2, 5-8. All claims against these additional defendants have been dismissed. *See* Notice of Dismissal Against Defendant State of Maine, attached as Exh. 2 to Removal Notice; Stipulation of Dismissal of Defendants Norway Police Department, Town of Norway, Oxford County, and (continued…)

statement of additional material facts. *See* Response to "Plaintiff's Statement of Material Facts in Dispute" with Incorporated Objections and Motions To Strike by the State of Maine Defendants ("Defendants' Reply SMF/Motion To Strike") (Docket No. 29). For the reasons that follow, I grant in part and deny in part the motion to strike and recommend that the motion for summary judgment be granted in part and denied in part.

I. Summary Judgment Standards

Summary judgment is appropriate only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant . . . . By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). "This is

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Oxford County Sheriff's Department (Docket No. 21).

especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Factual Context

A. Motion To Strike

As a threshold matter I address the State Defendants' motion to strike, which defines in part the factual backdrop against which their motion for summary judgment must be decided. The State Defendants object to, and move to strike, three paragraphs of Cox's statement of additional material facts: paragraphs 8, 10 and 11. *See* Plaintiff's Statement of Material Facts in Dispute ("Plaintiff's Additional SMF") (Docket No. 26) ¶¶ 8, 10-11; Defendants' Reply SMF/Motion To Strike ¶¶ 8, 10-11. I rule as follows:

1. **Paragraph 8: Granted**. The State Defendants object on hearsay grounds to Cox's statement (supported by his affidavit) that attorney Thomas Hallett, who represented Cox's son, informed Cox that Assistant District Attorney Richard Beauchesne told him that Cox's son was paying for the "sins of his father." *See* Defendants' Reply SMF/Motion To Strike ¶ 8. Cox rejoins that he offers the statement not for the truth of the matter asserted – that his son was paying for his sins – but to show bias and prejudice on the part of Beauchesne and the DA's Office. *See* Opposition to Defendant's [sic] Motion To Strike Plaintiff's Statement of Material Facts in Dispute ("Plaintiff's Strike Opposition") (Docket No. 31) at [1]-[2]. Cox's argument is unpersuasive. The matter being asserted, in this case, is that Beauchesne said the words attributed to him, and Cox offers the statement for the truth of that proposition. In any event, as the State Defendants note, *see* Defendants' Reply SMF/Motion To Strike ¶ 8, for purposes of summary judgment an affiant's statements must be made on personal knowledge, *see* Fed. R. Civ. Pro. 56(e). Cox had no personal knowledge that Beauchesne made the statement in question.

2. **Paragraph 10: Denied**. The State Defendants object to Cox's statement that his bail conditions caused him emotional distress and pain and suffering, asserting that (i) Cox adduces insufficient evidence that he had personal knowledge of these matters within the meaning of Federal Rule of Evidence 602 and (ii) the statement constitutes improper opinion testimony pursuant to Federal Rule of Evidence 701. *See* Defendants' Reply SMF/Motion To Strike ¶ 10.[2] Cox protests that this is counterintuitive. *See* Strike Opposition at [2]-[3].

To the extent that it is not self-evident that an individual would have personal knowledge that a certain event caused him or her emotional distress, Cox's affidavit adequately details the basis for such knowledge: *e.g.*, that he was wrongfully arrested on drug charges, released on bail conditions that prohibited contact with anyone under nineteen years old (including his children) and that these conditions caused him emotional distress. *See* Affidavit of John E. Cox III ("Cox Aff.") (Docket No. 25) ¶¶ 11-29. It accordingly passes muster pursuant to Rule 602.

Nor does Cox's opinion constitute improper lay testimony for Rule 701 purposes. While a lay witness is not competent to offer a self-diagnosis of the cause or nature of a mental impairment, *see, e.g., Ferris v. Pennsylvania Fed'n Bhd. of Maint. of Way Employees*, 153 F. Supp.2d 736, 746 (E.D. Pa. 2001), such a witness is competent to offer an opinion that certain events caused emotional injury or distress, *see, e.g., id.*; *Chladek v. Milligan*, No. 97-0355, 1998 WL 334699, at *3 (E.D. Pa. June 23, 1998); *see also, e.g., United States v. Vega-Figueroa*, 234 F.3d 744, 755 (1st Cir. 2000) ("[T]he

[2] Federal Rule of Evidence 602 provides, in relevant part: "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony." Federal Rule of Evidence 701 provides, in its entirety: "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, (continued…)

modern trend favors the admission of [lay] opinion testimony provided it is well founded on personal knowledge and susceptible to cross-examination."); *Schultz v. YMCA of United States*, 139 F.3d 286, 289-90 (1st Cir. 1998) ("Schultz's own deposition testimony [concerning his emotional distress] was obviously competent under the formal requirements of Fed. R. Civ. P. 56(e). . . . [W]ithout the report from the therapist, Schultz's own testimony would likely be evidence enough of emotional damage to avoid summary judgment, even if a jury might find it self-serving or not worth a significant award."). The testimony in question accordingly also passes muster pursuant to Rule 701.

3. **Paragraph 11: Granted**. I agree with the State Defendants, *see* Defendants' Reply SMF/Motion To Strike ¶ 11, that Cox has failed to lay an adequate foundation to establish the source of his personal knowledge as to the impact of the filing of criminal charges on his reputation in the community, *see generally* Cox Aff.

B. Cognizable Facts

With the disposition of the motion to strike taken into account, the parties' statements of material facts, credited to the extent either admitted or supported by record citations in accordance with Local Rule 56 and viewed in the light most favorable to Cox as the non-movant, reveal the following relevant to this recommended decision:[3]

During the time relevant to the Complaint, Cox was a resident of 178 Perkins Valley Road, Woodstock, Oxford County, Maine. Statement of Material Fact in Support of Motion for Summary

technical, or other specialized knowledge within the scope of Rule 702."

[3] Cox includes a number of facts in the body of his brief. *See generally* Plaintiff's Opposition to Defendant's [sic] Motion for Summary Judgment ("Plaintiff's S/J Opposition") (Docket No. 23). To the extent these facts are not also properly presented in a statement of material facts as required by Local Rule 56, they are not cognizable on summary judgment, and I have disregarded them. *See, e.g., Pew v. Scopino*, 161 F.R.D. 1, 1 (D. Me. 1995) ("The parties are bound by their [Local (continued…)

Judgment by the Defendants Maine State Police, Trooper John Hainey and Oxford County District Attorney's Office ("Defendants' SMF") (Docket No. 18) ¶ 1; Plaintiff's Opposing Statement of Material Facts ("Plaintiff's Opposing SMF") (Docket No. 24) ¶ 1. The MSP is a law-enforcement agency of the State of Maine with statutorily defined duties. *Id*. ¶ 2. State troopers have a statutory duty to investigate and prosecute violators of the laws of Maine and the power "to arrest without warrant and detain persons found violating or attempting to violate any other penal law of the State until a legal warrant can be obtained." *Id*. ¶ 3 (quoting 25 M.R.S.A. § 1502). Hainey is a trooper employed by the MSP. *Id*. ¶ 4. A graduate of the State Police Academy, he has been with the MSP for five years, is assigned to Troop B and patrols Oxford County. *Id*. The DA's Office is an agency of the State of Maine with statutorily defined duties. *Id*. ¶ 5. Its members prosecute all criminal cases in Oxford, Franklin and Androscoggin counties. *Id*.

On April 5, 2001 Officer Warren Ellsworth of the Town of Norway Police Department served a subpoena on an individual whose snowmobile had been stolen by Joseph Cox, who is Cox's son. *Id*. ¶¶ 6, 14.[4] The individual told Ellsworth that a co-worker of his had information that Joseph Cox was selling drugs. *Id*. ¶ 6. Ellsworth spoke with the co-worker ("Confidential Informant"), who told him that Joseph Cox had been selling drugs to students at Oxford Hills High School ("Oxford High"). *Id*. ¶ 7. The Confidential Informant told Ellsworth that he would be willing to make a controlled buy from Joseph Cox to corroborate that Joseph Cox was selling drugs. *Id*. ¶ 8.

Rule 56] Statements of Fact and cannot challenge the court's summary judgment decision based on facts not properly presented therein.").

[4] To avoid confusion, I shall henceforth refer to the plaintiff as "John Cox" or the "Plaintiff" and to his son as "Joseph Cox."

On April 6, 2001 the Confidential Informant told Ellsworth that an Oxford High student who had purchased drugs from Joseph Cox in the past was planning to do so again. *Id*. ¶ 9. On April 12, 2001 Sergeant Rob Ferdico of the Norway Police Department contacted Hainey, filled him in on the information Ellsworth had obtained from the Confidential Informant and asked him to assist with a drug purchase at the Cox residence. *Id*. ¶ 10. On April 25, 2001 Hainey and Ferdico met with the Confidential Informant at the Town of Norway Police Department. *Id*. ¶ 11. The Confidential Informant told them that he knew a student at Oxford High who claimed to have purchased drugs, including Ecstasy, from Joseph Cox. *Id*. ¶ 12. The Confidential Informant agreed to set up a drug purchase from Joseph Cox. *Id*.

On April 28, 2001 Hainey and Ferdico met with the Confidential Informant at the Town of Norway Police Department and made plans for him to purchase drugs from Joseph Cox at 178 Perkins Valley Road in Woodstock, Maine. *Id*. ¶ 13. At that time, Joseph Cox lived with his father at that address. *Id*. ¶ 14. The Confidential Informant was searched for illegal drugs by Ferdico, supplied with an electronic listening device – a transmitter – and given pre-recorded currency to use as "buy money." *Id*. ¶ 15. The transmitter allowed Hainey and Ferdico to record and hear conversation and sounds from and near the Confidential Informant. *Id*. ¶ 16. At approximately 7:45 p.m., the Confidential Informant traveled to the Cox residence in one vehicle, with Ferdico and Hainey in another. *Id*. ¶ 17. Hainey and Ferdico saw the Confidential Informant enter the Cox residence, after which they listened to and recorded conversations and sounds picked up by the transmitter. *Id*. ¶ 18. Hainey heard conversations among individuals inside the residence that were consistent with drug-trafficking activity, including the sale of Oxycodone by Joseph Cox to the Confidential Informant. *Id*. ¶ 19. Hainey heard Joseph Cox tell the Confidential Informant that John Cox had come back from North Carolina on a "drug run" and that he would have John Cox get him "an eighth of

marijuana." Defendants' SMF ¶ 20; Deposition of Trooper John Hainey ("Hainey Dep.") (Docket No. 27), at 16.[5]

During the time the Confidential Informant was in the Cox residence, Hainey did not hear John Cox participate in any conversations and did not know if he was then home. Defendants' SMF ¶ 21; Plaintiff's Opposing SMF ¶ 21. John Cox was not then at home. Plaintiff's Additional SMF ¶ 12; Defendants' Reply SMF/Motion To Strike ¶ 12. The Confidential Informant was in the Cox residence for approximately ninety minutes, after which Hainey saw him leave and get in his car. Defendants' SMF ¶ 22; Plaintiff's Opposing SMF ¶ 22. Hainey then met him at a prearranged location. *Id*. The Confidential Informant gave Hainey a plastic bag containing four dosage units of Oxycodone Hydrochloride ("Roxicodone") he had purchased from Joseph Cox for $15. *Id*. ¶ 23. Hainey debriefed the Confidential Informant, who confirmed that the Oxycodone was purchased from Joseph Cox. *Id*. ¶ 24. Hainey also searched the Confidential Informant's car for illegal drugs and found none. *Id*. Roxicodone is a non-time-released version of Oxycontin. *Id*. ¶ 25.

On May 7, 2001 Hainey prepared an affidavit and request for a search warrant using information obtained from the controlled buy at the Cox residence. *Id*. ¶ 26. As of that date, Hainey acknowledged that he did not believe he had probable cause to obtain an arrest warrant for John Cox. *Id*. ¶ 27. Maine District Court Judge John Beliveau signed the search warrant at 2:40 p.m. on May 7, 2001. *Id*. ¶ 28. The search warrant authorized a daylight search of the Cox residence at 178 Perkins Valley Road for scheduled drugs, including Oxycodone, drug paraphernalia, papers and other effects related to drug furnishing or trafficking. *Id*. ¶ 29.

[5] The Plaintiff purports to dispute this assertion, *see* Plaintiff's Opposing SMF ¶ 20; however, his disputation is not (continued…)

Hainey participated in the execution of the search warrant at the Cox residence at 8:30 a.m. on May 9, 2001. *Id.* ¶ 30. Two Oxycodone tablets and drug paraphernalia were found in Joseph Cox's bedroom. *Id.* A triple-beam scale with marijuana residue, an empty Roxicodone bottle and a bottle of sixty-five Roxicodone tablets with a "tampered label" were found in the kitchen. Defendants' SMF ¶ 31; Maine State Police Continuation Report ("Hainey Report"), attached to Maine State Police Investigation Report, Exh. 1 to Hainey Dep., at 4.[6] In Hainey's experience, triple-beam scales are used for marijuana packaging. Defendants' SMF ¶ 32; Hainey Dep. at 30. John Cox told Hainey that the scale was for his "personal use" and denied any involvement in selling drugs. Defendants' SMF ¶ 32; Hainey Report at 6.[7] However, the next day, Matthew Ryerson of Oxford told Hainey that he had purchased marijuana from John Cox on at least two occasions. Defendants' SMF ¶ 32; Hainey Report at 6-7.[8]

John Cox stayed in his home while Hainey and other law enforcement personnel conducted the search. Defendants' SMF ¶ 33; Plaintiff's Opposing SMF ¶ 33. He informed Hainey that he had been prescribed the Roxicodone pills found in his house. Plaintiff's Additional SMF ¶ 4; Defendants' Reply SMF/Motion To Strike ¶ 4. He explained to law enforcement that he had not provided the Roxicodone pills prescribed to him to his son or to anyone else. *Id.* ¶ 5. He further told Hainey that he kept his pills with him "on his person" at all times except when he slept. Defendants' SMF ¶ 33; Plaintiff's Opposing SMF ¶ 33. *Id.* He told Hainey that he accounts for the number of pills he uses and that if anyone had taken

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supported by a record citation as required by Local Rule 56(c) and is on that basis disregarded, *see* Loc. R. 56(e).

[6] The Plaintiff purports to dispute that the label was tampered with, *see* Plaintiff's Opposing SMF ¶ 31; however, his disputation is not supported by a record citation as required by Local Rule 56(c) and is on that basis disregarded, *see* Loc. R. 56(e). The State Defendants acknowledge that they do not know what the term "tampered label" means. *See* Defendants' SMF ¶ 31 n.1.

[7] The Plaintiff purports to dispute that he told Hainey the scale was for his personal use, *see* Plaintiff's Opposing SMF ¶ 32; however, his disputation is not supported by a record citation as required by Local Rule 56(c) and is on that basis disregarded, *see* Loc. R. 56(e).

[8] The Plaintiff purports to dispute that he has sold marijuana, *see* Plaintiff's Opposing SMF ¶ 32; however, his disputation (continued…)

some of them, he would have known about it. Defendants' SMF ¶ 34; Hainey Report at 5. He also informed Hainey that he had questioned the count of his pills with his pharmacist several weeks prior to May 9, 2001. Plaintiff's Additional SMF ¶ 7; Cox Aff. ¶ 17.[9] On April 21, 2001 John Cox had called his pharmacist because he felt that he was missing a few of his Roxicodone pills. Plaintiff's Additional SMF ¶ 2; Defendants' Reply SMF/Motion To Strike ¶ 2. The pharmacist later noted that the plaintiff had questioned the quantity of pills dispensed. *Id.*

During the time the search warrant was executed, no evidence of drug-trafficking or drug- furnishing activities was found that could be attributed to John Cox (other than a scale that would not be used in trafficking Oxycontin or Roxicodone). Plaintiff's Additional SMF ¶ 3; Cox Aff. ¶ 13; Hainey Dep. at 29-32.[10] Joseph Cox denied that John Cox had ever given him Oxycodone tablets. Defendants' SMF ¶ 34; Hainey Dep. at 22.

Hainey conferred with Assistant District Attorney Richard Beauchesne at the DA's Office. Defendants' SMF ¶ 35; Plaintiff's Opposing SMF ¶ 35. Hainey went over the items and information obtained during the search of the Cox residence and discussed the existence of probable cause to arrest John Cox. *Id*. He believed that probable cause existed to arrest John Cox on May 9, 2001 based upon information and items obtained during the search, John Cox's prior marijuana and possession of drug

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is not supported by a record citation as required by Local Rule 56(c) and is on that basis disregarded, *see* Loc. R. 56(e).

[9] The State Defendants deny that John Cox told Hainey he had questioned the count of the pills in his prescription prior to the April 28, 2001 controlled buy, *see* Defendants' Reply SMF/Motion To Strike ¶ 7; however, I view the facts in the light most favorable to the Plaintiff, as non-movant.

[10] The State Defendants qualify this statement, *see* Defendants' Reply SMF/Motion To Strike ¶ 3, asserting that (i) a triple-beam scale with marijuana residue was found in the kitchen hutch, *see* Maine Drug Enforcement Agency Crime Scene Evidence Log, Exh. 2 to Hainey Dep., at 1 (Item No. 6), (ii) in Hainey's experience, such scales are often used for measuring large quantities of marijuana, *see* Hainey Dep. at 30, (iii) John Cox admitted that the scale was his, *see* Hainey Report at 6, and (iv) miscellaneous drug paraphernalia was also found in John Cox's bedroom, *see* Hainey Dep. at 31. The State Defendants further qualify the statement by noting that six plastic bags containing marijuana residue were found throughout the house in plain view, *see* Defendants' Reply SMF/Motion To Strike ¶ 3; however, that assertion is (continued…)

paraphernalia arrests, John Cox's statement that if someone had taken any of his pills he would have known about it, the fact that Joseph Cox had possession of some of the pills, the fact that pills of the same size and color were purchased by the Confidential Informant on April 28, 2001, and Joseph Cox's claim that his father left the pills around the house. Defendants' SMF ¶ 36; Hainey Dep. at 18-21.[11] Beauchesne agreed with Hainey that probable cause existed to arrest John Cox. Defendants' SMF ¶ 37; Plaintiff's Opposing SMF ¶ 37.

John Cox was thereafter arrested on drug charges. *Id*. Hainey told the Plaintiff that he was being arrested because he was not acting responsibly with his pills. Plaintiff's Additional SMF ¶ 6; Cox Aff. ¶ 16.[12]

John Cox was transported to the Oxford County Jail at approximately 11:30 a.m. on May 9, 2001. *Id*. ¶ 38. He was released on bail at 2 p.m. that day. *Id*. His bail bond indicates that his "initial arrest" was for "aggravated furnishing" of a scheduled drug. *Id*. In a motion to amend bail conditions, he stated that he "was arrested on or about May 9, 2001 for furnishing a Schedule W substance, namely, Roxicodone." *Id*. ¶ 39. The conditions of release accompanying his bail bond indicated that he was required to appear for an arraignment in the Maine District Court in South Paris on June 25, 2001 at 8:30 a.m. *Id.* ¶ 40. His initial bail conditions were that he have no contact with anyone under the age of nineteen, which prohibited him from having contact with his children. Plaintiff's Additional SMF ¶ 10;

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inconsistent with the underlying assertion to which it responds, and I view the cognizable record in the light most favorable to the Plaintiff as non-movant.

[11] The Plaintiff purports to dispute that Joseph Cox claimed he left pills around the house, *see* Plaintiff's Opposing SMF ¶ 36; however, his disputation is not supported by a record citation as required by Local Rule 56(c) and is on that basis disregarded, *see* Loc. R. 56(e).

[12] The State Defendants qualify this statement, asserting that the Plaintiff was also told that he was arrested for aggravated furnishing of a scheduled drug, *see* Defendants' Reply SMF ¶ 6; Commitment Order with Conditions of Release, attached as Exh. 5 to Complaint, at 2; however, I note that the document cited does not state that Hainey so informed the Plaintiff.

Defendants' Reply SMF/Motion To Strike ¶ 10. Bail was later amended to provide for restricted contact with individuals under eighteen years old. *Id*. These bail conditions caused the Plaintiff emotional distress and pain and suffering. *Id*.

Hainey's involvement in the allegations of the Complaint in this case ended on May 10, 2001, when his case was "closed by arrest." *Id*. ¶ 41. John Cox was later charged with trafficking in a scheduled drug, in violation of 17-A M.R.S.A. § 1105-A, by Assistant Attorney General David Fisher. *Id*. ¶ 42. Hainey did not make any recommendations as to which charges should be brought against John Cox. *Id*. ¶ 43. On June 19, 2001 Fisher issued a memorandum to Laura Nokes of the Maine District Court in South Paris stating that no complaint would be issued against John Cox for the offense of aggravated trafficking in a scheduled drug. *Id*. ¶ 44. The memorandum indicated that John Cox's scheduled arraignment date was June 25, 2001. *Id*. ¶ 45. John Cox mailed a notice of claim dated December 13, 2001 pursuant to the Maine Tort Claims Act ("MTCA") to Andrew Ketterer, Department of the Attorney General, 6 State House Station, Augusta, Maine 04333. *Id*. ¶ 46.

John Cox did not furnish Roxicodone to his son. Plaintiff's Additional SMF ¶ 1; Cox. Aff. ¶ 11.[13] For many years the Plaintiff's family has felt harassed by local law enforcement. Plaintiff's Additional SMF ¶ 9; Defendant's Reply SMF/Motion To Strike ¶ 9.

III. Analysis

A. State-Law Claims

[13] The State Defendants qualify this statement, asserting that (i) during the execution of the search warrant at the Cox residence on May 9, 2001 two Roxicodone tablets in a plastic bag were found in Joseph Cox's bedroom, and (ii) John Cox told Hainey that he kept his pills on his person except when he was sleeping and that he would know if somebody had been taking pills from him. *See* Defendants' Reply SMF/Motion To Strike ¶ 1; Hainey Report at 4-5.

The Plaintiff asserts a number of state-law causes of action against the State Defendants, bringing claims against the MSP for wrongful arrest (Count I), false imprisonment (Count II), intentional infliction of emotional distress ("IIED") (Count IV), negligent infliction of emotional distress ("NIED") (Count VI) and defamation (Count VIII); against the DA's Office for malicious prosecution (Count III), IIED (Count V) and NIED (Count VII); and against Hainey for defamation (Count VIII). Complaint ¶¶ 85-125.

The State Defendants seek summary judgment as to all state-law counts on the ground that the requisite MTCA notice of claim was untimely filed. *See* Defendants' S/J Motion at 3-4. The MTCA requires filing of a written notice of claim with the appropriate governmental entity "[w]ithin 180 days after any claim or cause of action permitted by this chapter accrues, or at a later time within the limits of section 8110, when a claimant shows good cause why notice could not have reasonably been filed within the 180-day limit[.]" 14 M.R.S.A. § 8107(1) & (3). Absent substantial compliance with this requirement, no MTCA action against a governmental entity or employee may be commenced in Superior Court. *Id*. § 8107(4).

The State Defendants posit that (i) the Plaintiff's causes of action accrued on May 9, 2001 (when he was arrested and freed on bail), (ii) the December 13, 2001 filing thus came too late, and (iii) the Plaintiff has shown no good cause for his tardiness. *See* Defendants' S/J Motion at 3-4.[14] The Plaintiff rejoins that none of his causes of action accrued until June 19, 2001, when he was "no-complainted" by the DA's Office. *See* Plaintiff's S/J Opposition at 3-6.[15]

As the Law Court has noted:

[14] By my count, if the causes of action accrued on May 9, 2001 the notice was due by November 5, 2001 and hence was untimely filed.

[15] By my count, if the causes of action accrued on June 19, 2001 the notice was due by December 16, 2001 and hence was timely filed.

(continued…)

> The general test for determining when a cause of action accrues is when a plaintiff received a judicially recognizable injury. A tort claim accrues when the plaintiff sustains harm to a protected interest. In other words, it accrues at the point at which a wrongful act produces an injury for which a potential plaintiff is entitled to seek judicial vindication.

McLaughlin v. Superintending Sch. Comm. of Lincolnville, 832 A.2d 782, 788 (Me. 2003) (citations and internal quotation marks omitted).

While both sides acknowledge this general precept, each neglects to analyze how it is applied in the context of the specific torts in issue (apart from that of malicious prosecution). *See* Defendants' S/J Motion at 3-4; Plaintiff's S/J Opposition at 3-6; Reply to Plaintiff's Opposition to Motion for Summary Judgment by the Maine State Police, Trooper John R. Hainey and the Oxford County District Attorney's Office ("Defendants' S/J Reply") (Docket No. 30) at 1-5. The parties are reminded that it is their responsibility in the first instance to flesh such concepts out. However, in the face of this failing, I have endeavored to fill in the gaps.

Turning first to Counts I and II, my research reveals that the Law Court has held that causes of action for both false arrest and wrongful imprisonment accrue when a plaintiff is released from jail. *See Jedzierowski v. Jordan*, 157 Me. 352, 352-53 (1961) (action for false arrest and imprisonment accrued on day plaintiff was released on his own recognizance, not when plaintiff later was found not guilty of charge lodged against him); *see also, e.g., Belflower v. Blackshere*, 281 P.2d 423, 425 (Okla. 1955) ("In an illegal arrest and false imprisonment case, we are convinced that the . . . statute of limitations begins to run . . . at the time plaintiff was released from his alleged illegal restraint and not when the proceedings by which his arrest occurred terminated, and that this particular action could have been prosecuted to a successful result at the time plaintiff was released[.]") (cited with favor in *Jedzierowski*). Thus, in this case, Counts I and II

accrued on May 9, 2001.[16] The Plaintiff neither timely filed the requisite MTCA notice with respect to those claims nor demonstrates good cause for its tardy filing, entitling the MSP to summary judgment as to Counts I and II.

With respect to Count III, the Plaintiff points out that a cause of action for malicious prosecution does not accrue until there has been "a favorable termination of the proceedings." *See* Plaintiff's S/J Opposition at 4 (quoting *Nadeau v. State*, 395 A.2d 107, 116 (Me. 1978)). He relies on *Bickford v. Lantay*, 394 A.2d 281 (Me. 1978), for the proposition that "a prosecutor's no complaint of a criminal charge" constitutes a favorable termination of proceedings for purposes of a malicious-prosecution claim. *See id*. at 4-5. Accordingly, he argues, his cause of action for malicious prosecution accrued on June 19, 2001. *See id*. at 5. I agree.

The State Defendants respond that the instant case is distinguishable from *Bickford* inasmuch as in that case, the prosecutor entered a *nolle prosequi* after criminal proceedings against the plaintiff had commenced, whereas here, the prosecutor sent a no-complaint letter to the clerk of the court before a criminal complaint issued or John Cox was arraigned on criminal charges. *See* Defendants' S/J Reply at 1-3. As a result, they reason, the no-complaint letter did not operate as "an outcome favorable to the plaintiff" as did the *nolle prosequi* in *Bickford*, and any cause of action the Plaintiff had for malicious prosecution accrued when he was arrested on May 9, 2001. *See id*. at 2-3. This appears, in essence, to be an

[16] To the extent the Plaintiff means to argue that false-arrest and wrongful-imprisonment claims do not accrue until a plaintiff is freed of all restraints on his or her liberty (including restrictive bail conditions), he cites no authority for that proposition, *see* Plaintiff's S/J Opposition at 5-6, and I find none. Inasmuch as appears, the focus is on when a plaintiff physically is freed from custody. *See, e.g., Mellett v. Fairview Health Servs*., 634 N.W.2d 421, 425 n.2 (Minn. 2001) (rejecting argument that plaintiff's false imprisonment continued until her commitment petition was dismissed although she was physically released earlier; holding that "one of the elements of false imprisonment is actual confinement[.]").

argument that the June 19, 2001 no-complaint letter cannot have been a favorable termination of "proceedings" against the Plaintiff inasmuch as no "proceedings" as yet had begun. *See id*.

I note, as a threshold matter, that *Bickford* does not purport to determine when "proceedings" commence for purposes of a malicious-prosecution claim. *See generally Bickford*, 394 A.2d 281. Beyond this, there is no cognizable evidence that a criminal complaint was – or was not – filed against the Plaintiff. In fact, the State Defendants acknowledge that at some point prior to the issuance of the no-complaint letter the DA's Office charged him with a crime. *See* Defendants' SMF ¶ 42. Inasmuch as appears, this is enough to constitute the commencement of "proceedings" for purposes of a malicious-prosecution action. *See, e.g., Hilt v. Hurd*, No. 2:01CV00017, 2001 WL 1242091, at *2 (W.D. Va. Oct. 18, 2001) ("The Restatement [(Second) of Torts § 654] defines 'criminal proceedings' as proceedings where the government seeks to prosecute and impose a penalty. Criminal proceedings are instituted when criminal process is issued, an indictment is issued by the grand jury, an information is filed or an arrest is made.") (citations omitted); *compare, e.g., Schroeder v. De Bertolo*, 912 F. Supp. 23, 26 (D.P.R. 1996) ("It is not enough that a mere complaint has been made to the proper authorities for the purpose of setting prosecution in motion, where no official action ever has been taken.") (citation and internal quotation marks omitted); *Stromberg v. Costello*, 456 F. Supp. 848, 850 (D. Mass. 1978) ("A Massachusetts court has stated that criminal proceedings may be considered commenced when complaints are signed. The allegations at bar indicate merely that defendant applied unsuccessfully for the issuance of such complaints.") (citation omitted).

The State Defendants thus fall short of demonstrating, for purposes of summary judgment, that any cause of action the Plaintiff may have for malicious prosecution accrued on May 9, 2001 rather than June

19, 2001, when the no-complaint letter issued. Accordingly, they fail to demonstrate the DA's Office's entitlement to summary judgment as to Count III.[17]

Turning to the remaining counts, the parties do not cite, nor do I find, published Maine caselaw delineating when causes of action for IIED (Counts IV-V), NIED (Counts VI-VII) and defamation (Counts VIII) accrue. Nor do the parties cite any other authority shedding light on these points. However, my research indicates that, as a general matter, (i) a cause of action for defamation accrues on the date the alleged defamatory statement was published, *see, e.g., Shively v. Bozanich*, 80 P.3d 676, 686 (Cal. 2003); *Abate v. Maine Antique Digest*, No. 03-3759, 2004 WL 293903, at *1 (Mass. Super. Ct. Jan. 26, 2004); and (ii) causes of action for both NIED and IIED accrue when a plaintiff suffers severe emotional distress – an essential element of both, *see, e.g., Russell v. Adams*, 482 S.E.2d 30, 33 (N.C. Ct. App. 1997); *Curtis v. Porter*, 784 A.2d 18, 22-23, 26 (Me. 2001) (for purposes of both NIED and IIED, plaintiff must show, *inter alia*, that he or she suffered severe emotional distress); *see also, e.g., Quinn v. Walsh*, 732 N.E.2d 330, 332-33 (Mass. App. Ct. 2000) (cause of action for IIED accrues "on the date a plaintiff first experiences anxiety or distress that is the intended result of the defendant's conduct").

[17] In their reply memorandum, the State Defendants offer several additional arguments in support of summary judgment as to Count III, including (i) that the issuance of the no-complaint letter did not constitute a "favorable termination" of any proceedings instituted, (ii) that the Plaintiff fails to generate issues of material fact as to key elements of his malicious-prosecution claim, and (iii) that the real party in interest is the State of Maine. *See* Defendants' S/J Reply at 2 n.1 & 3-4. None of these points was raised in the State Defendants' motion for summary judgment, which relied solely on the asserted tardiness of the MTCA notice filing. *See* Defendants' S/J Motion at 3-4. In a footnote in their reply memorandum, the State Defendants note: "Since the Plaintiff argues that this claim is not barred by his non-compliance with 14 M.R.S.A. § 8107, the Defense addresses the merits." Defendants' S/J Reply at 3 n.4. However, an opposition to summary judgment on statute-of-limitations grounds in which (as here) the plaintiff does not himself address the merits does not serve as an invitation for the movant belatedly to explore those merits for the first time in a reply brief. *See, e.g., In re One Bancorp Sec. Litig.*, 134 F.R.D. 4, 10 n.5 (D. Me. 1991) (court generally will not address an argument advanced for the first time in a reply memorandum). The belated arguments accordingly are disregarded.

Against this backdrop, the Plaintiff's defamation claim against Hainey and the MSP (Count VIII) and his NIED and IIED claims against the MSP (Counts IV and VI) readily can be discerned to be time-barred. The Plaintiff adduces no cognizable evidence that Hainey or the MSP engaged in any objectionable conduct after May 10, 2001. In fact, it is undisputed that Hainey's involvement in the allegations of the Complaint ended on May 10, 2001, when the case was "closed by arrest." *See* Defendants' SMF ¶ 44; Plaintiff's Opposing SMF ¶ 44. Therefore, any defamation claim against Hainey and the MSP accrued, at the latest, by May 10, 2001. The Plaintiff neither timely filed the requisite MTCA notice as regards this claim nor offers any good cause for its tardy filing, entitling Hainey and the MSP to summary judgment as to Count VIII.

With respect to the NIED and IIED claims, the Plaintiff's only cognizable evidence of emotional harm is his assertion that the imposition of bail conditions caused him pain and suffering and emotional distress. *See* Plaintiff's Additional SMF ¶ 10. Bail conditions were imposed on May 9, 2001. While the Plaintiff asserts that his emotional distress continued until June 19, 2001, *see* Plaintiff's S/J Opposition at 5-6, he adduces no evidence of post-May 9 conduct on the part of the MSP apart from the simple ministerial act of closing out his case on May 10, 2001. Lingering after-effects do not, alone, suffice to extend the statute of limitations, *see, e.g., McLaughlin*, 832 A.2d at 789 n.6 ("The common law continuing tort doctrine may be applied when no single incident in a chain of tortuous [sic] activity can fairly or realistically be identified as the cause of significant harm. In such cases, the breach of duty is regarded as a single continuing wrong that terminates when the exposure to the harm terminates.") (citations and internal quotation marks omitted); *Feltmeier v. Feltmeier*, 798 N.E.2d 75, 85 (Ill. 2003) ("A continuing violation or tort is occasioned by continuing unlawful acts and conduct, not by continual ill effects from an initial violation."). Thus, any causes of action that the Plaintiff had against the MSP for IIED or NIED accrued as

of May 9, 2001. He neither timely filed the requisite MTCA notice with respect to those claims nor demonstrates good cause for its tardy filing, entitling the MSP to summary judgment as to Counts IV and VI.

I turn finally to the Plaintiff's IIED and NIED claims against the DA's Office (Counts V and VII), with respect to which I reach a different result. In this context the Plaintiff's continuing-harm argument, *see* Plaintiff's S/J Opposition at 5-6, carries weight. The Plaintiff complains of emotional harm arising from the imposition of bail conditions. Those bail conditions were an integral part of the DA's prosecution of the case against him and were not lifted until the DA's Office elected to cease prosecution on June 19, 2001. Thus, for purposes of Counts V and VII, the Plaintiff adequately sketches a scenario of ongoing harmful conduct terminating on that date.[18] *See, e.g.*, *Feltmeier*, 798 N.E.2d at 89 ("[I]n the case of a continuing tort, such as the one at bar, a plaintiff's cause of action accrues, and the statute of limitations begins to run, at the time the last injurious act occurs or the conduct is abated."); *McLaughlin*, 832 A.2d at 789 n.6 (noting that in the case of a continuing tort, the "breach of duty is regarded as a single continuing wrong that terminates when the exposure to the harm terminates."). Inasmuch as exposure to the harm terminated on June 19, 2001, the Plaintiff's MTCA notice was timely filed with respect to his IIED and NIED claims against the DA's Office. The DA's Office accordingly falls short of demonstrating entitlement to summary judgment as to Counts V and VII of the Complaint.[19]

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[18] The Plaintiff does not adduce cognizable evidence that his emotional harm continued until June 19, 2001; however, that fact is reasonably inferable from the facts that are set forth, and on summary judgment all reasonable inferences must be drawn in favor of the non-movant (here, the Plaintiff).

[19] The State Defendants argue for the first time in their reply memorandum that, even assuming *arguendo* the timeliness of the tort claims, those claims yet fail on the bases of MTCA immunity and misplaced reliance on a *respondeat superior* theory of liability. *See* Defendants' S/J Reply at 4-5. The new arguments are not responsive to points raised by the Plaintiff, *see* Plaintiff's S/J Opposition at 5-6, and on that basis are disregarded, *see, e.g.*, *In re One Bancorp*, 134 F.R.D. at 10 n.5 (court generally will not address an argument raised for the first time in a reply memorandum).

B. Federal Claims

The State Defendants finally seek summary judgment as to the remaining substantive count against them (Count IX), in which the Plaintiff seeks relief pursuant to 42 U.S.C. § 1983 for alleged violations of his federal constitutional rights. *See* Defendants' S/J Motion at 4-11; Complaint ¶¶ 126-40. As a threshold matter, the State Defendants argue that the Eleventh Amendment bars the Plaintiff's section 1983 action against the MSP and the DA's Office. *See* Defendants' S/J Motion at 4-5. The Plaintiff agrees that his federal claims against those two defendants should be dismissed, *see* Plaintiff's S/J Opposition at 6 n.2, entitling them to summary judgment as to Count IX and its companion count, Count X, which requests attorney fees pursuant to 42 U.S.C. § 1988, *see* Complaint ¶ 141.

This leaves Hainey, who is alleged in Count IX to have violated the Plaintiff's (i) procedural due-process rights by violating his right to liberty, (ii) substantive due-process rights by engaging in arbitrary and/or conscience-shocking conduct, and (iii) Fourth, Fifth and Eighth Amendment rights. *See* Complaint ¶¶ 137-39.

The State Defendants correctly construe the Eighth and Fifth Amendment claims as inapposite with respect to Hainey, observing that (i) a claim of cruel and unusual punishment pursuant to the Eighth Amendment properly is invoked by a convicted prisoner and (ii) any due-process claim arising from the Plaintiff's warrantless arrest would implicate Fourth Amendment rather than Fifth Amendment jurisprudence. *See* Defendants' S/J Motion at 4 n.2; *Whitley v. Albers*, 475 U.S. 312, 318 (1986) ("The Cruel and Unusual Punishments Clause was designed to protect those convicted of crimes, and consequently the Clause applies only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions.") (citations and internal quotation marks omitted); *Westover v. Reno*, 202 F.3d 475, 479 n.4 (1st Cir. 2000) (claimed violations of due process arising from

warrantless arrest arise under Fourth Amendment, not Fifth Amendment). With these clarifications, the State Defendants perceive the Complaint as alleging the commission of two constitutional torts by Hainey (potentially bottomed on Fourteenth Amendment due-process or Fourth Amendment search-and-seizure jurisprudence): malicious prosecution and false arrest. *See* Defendants' S/J Motion at 5-11. The Plaintiff implicitly agrees. *See* Plaintiff's S/J Opposition at 6-13 (opposing summary judgment with respect to false-arrest, malicious-prosecution claims against Hainey).

The State Defendants suggest that in the circumstances of this case, the malicious-prosecution claim against Hainey is foreclosed by a straightforward application of First Circuit precedent. *See* Defendants' S/J Motion at 5-7. I agree. As the Plaintiff concedes, he has no sustainable malicious-prosecution claim based on substantive or procedural due process. *See* Plaintiff's S/J Opposition at 12-13 n.4; *see also, e.g.*, *Nieves v. McSweeney*, 241 F.3d 46, 53-54 (1st Cir. 2001) ("It is perfectly clear that the Due Process Clause cannot serve to ground the appellants' federal malicious prosecution claim. No procedural due process claim can flourish in this soil because Massachusetts provides an adequate remedy for malicious prosecution. Similarly, a plurality of the Supreme Court has concluded that substantive due process may not furnish the constitutional peg on which to hang a federal malicious prosecution tort. We have followed the Court's lead in this respect, and we hew to that line today.") (citations and internal quotation marks omitted); *Roche v. John Hancock Mut. Life Ins. Co.*, 81 F.3d 249, 256 (1st Cir. 1996) (same); *Nadeau*, 395 A.2d at 116 ("Malicious prosecution has long been recognized as an actionable tort in this jurisdiction.").

Nor, in view of the fact that Hainey's arrest of the Plaintiff was warrantless, does the Plaintiff make out a sustainable Fourth Amendment claim for malicious prosecution. *See, e.g., Nieves*, 241 F.3d at 54 ("The tort of malicious prosecution permits damages for a deprivation of liberty – a seizure – *pursuant to*

legal process. Generally, the offending legal process comes either in the form of an arrest warrant (in which case the arrest would constitute the seizure) or a subsequent charging document (in which case the sum of post-arraignment deprivations would comprise the seizure). . . . The appellants were arrested without a warrant and, thus, their arrests – which antedated any legal process – cannot be part of the Fourth Amendment seizure upon which they base their section 1983 claims.") (citations omitted) (emphasis in original).

Hainey accordingly is entitled to summary judgment with respect to the Plaintiff's federal malicious-prosecution claim.

Turning to the Plaintiff's federal false-arrest claim against Hainey, such a claim is made out by a showing of (i) intent to confine the plaintiff, (ii) awareness of the confinement by the plaintiff, (iii) absence of consent by the plaintiff and (iv) absence of privilege for the confinement. *See, e.g., Calero-Colon v. Betancourt-Lebron*, 68 F.3d 1, 3 n.6 (1st Cir. 1995). That an arrest was privileged may be shown by establishing that it was based on probable cause. *See, e.g., Shain v. Ellison*, 273 F.3d 56, 67 (2d Cir. 2001). The State Defendants invoke qualified immunity, arguing that Hainey's arrest of the Plaintiff was privileged inasmuch as Hainey had either actual or arguable probable cause to arrest him and, in any event, did not violate his clearly established rights. *See* Defendants' S/J Motion at 7-11.

As the First Circuit has clarified:

> Determining whether qualified immunity is available to a particular defendant at a particular time requires a trifurcated inquiry. We ask, first, whether the plaintiff has alleged the violation of a constitutional right. If so, we then ask whether the contours of the right were sufficiently established at the time of the alleged violation. Finally, we ask whether an objectively reasonable official would have believed that the action taken or omitted violated that right.

Acevedo-Garcia v. Monroig, 351 F.3d 547, 563-64 (1st Cir. 2003) (citations and internal quotation marks omitted).

In accordance with this tripartite analytical structure, I first consider whether the cognizable facts, viewed in the light most favorable to the Plaintiff, establish that Hainey arrested him without probable cause. *See McDermott v. Town of Windham*, 204 F. Supp.2d 54, 61 (D. Me. 2002) ("The threshold inquiry is: relying on the facts alleged in the summary judgment record, taken in the light most favorable to the Plaintiff, whether McDermott's arrest was based on probable cause."). The First Circuit has described probable cause as "a fluid concept," noting:

> Its existence must be evaluated under the entirety of the circumstances. Probable cause to arrest does not demand either the same quantum of proof or the same degree of certitude as a conviction. Probable cause does, however, require reasonably trustworthy information such as would lead a prudent person to believe that the suspect likely had committed or was committing a criminal offense.

United States v. Lee, 317 F.3d 26, 32 (1st Cir. 2003) (citations omitted).

Hainey arrested the Plaintiff for aggravated furnishing of a Schedule W drug (Roxicodone). Pursuant to Maine law, a person is guilty of unlawful trafficking in a Schedule W drug "if the person intentionally or knowingly trafficks in what the person knows or believes to be a scheduled drug, which is in fact a scheduled drug[.]" 17-A M.R.S.A. § 1103(1-A). A person is guilty of aggravated trafficking in a Schedule W drug if he or she (a) violates section 1103 and, (b) *inter alia*, "trafficks in a scheduled drug with a child who is in fact less than 18 years of age" or, "[a]t the time of the offense, . . . enlists or solicits the aid of or conspires with a child who is in fact less than 18 years of age to traffick in a scheduled drug[.]" *Id.* § 1105-A(1)(A) & (F).

I agree with the Plaintiff that the cognizable evidence, viewed in the light most favorable to him, establishes that Hainey lacked probable cause to believe that he had committed the crime of aggravated furnishing of a Schedule W drug. *See* Plaintiff's S/J Opposition at 6-12. This was so inasmuch as, at the time of arrest, (i) neither the Confidential Informant nor the controlled buy had implicated John Cox in Roxicodone trafficking, (ii) the search of the Cox residence turned up no item linking John Cox to Roxicodone trafficking (except, arguably, the empty Roxicodone bottle with the "tampered" label found in the Cox kitchen), (iii) Hainey knew that John Cox had a prescription for Roxicodone, and (iv) no statement had been made directly linking John Cox to Roxicodone trafficking.

Having answered the first of the three qualified-immunity questions in the affirmative, I proceed to the second: whether the right Hainey is alleged to have violated was clearly established. The First Circuit has left no doubt that the answer is yes. *See, e.g., Abreu-Guzman v. Ford*, 241 F.3d 69, 73 (1st Cir. 2001) ("It has been clearly established for a very long time that the Fourth Amendment requires that arrests be based on probable cause.").

This brings me to the final question: "whether an objectively reasonable officer, performing discretionary functions, would have understood his or her conduct violated that clearly established constitutional right." *Id*. This question "itself is subject to certain ground rules," among them that an officer's subjective intent is irrelevant, *id*., and that, in the context of a warrantless arrest, "[p]olice are afforded immunity so long as the presence of probable cause is at least arguable," *Fletcher v. Town of Clinton*, 196 F.3d 41, 53 (1st Cir. 1999) (citation and internal quotation marks omitted).

Viewing the cognizable evidence in the light most favorable to the Plaintiff, I cannot conclude that the presence of probable cause was arguable. In my view, a reasonable officer standing in Hainey's shoes could have (i) at least arguably found probable cause to believe John Cox guilty of trafficking in marijuana

and (ii) harbored sufficient suspicion to warrant further investigation into the possibility that he had been dealing in Roxicodone as well. However, the points the State Defendants emphasize do not sway me that Hainey possessed arguable probable cause that John Cox was trafficking in Roxicodone with (or to) youths, specifically:

1. That a controlled buy had occurred at the Cox residence on April 28, 2001, and a subsequent search of the residence produced evidence related to drug offenses. *See* Defendants' S/J Motion at 9. Critically, neither the controlled buy nor the search linked John Cox to trafficking in Roxicodone pills.

2. That John Cox told Hainey he kept his Oxycodone with him at all times except when he slept, that he accounted for all of his tablets and that he would have known if anyone had taken them. *See id*. Awareness that one's pills are missing is a far cry from intentional and knowing involvement in their illegal sale – particularly if the pills are out of one's possession and control during sleep. In any event, the evidence viewed in the light most favorable to the Plaintiff establishes that (i) John Cox also told Hainey that he had questioned the count of his pills with his pharmacist several weeks prior to May 9, 2001, and (ii) the pharmacist was in a position to verify this (having later noted that the Plaintiff had questioned the quantity of pills dispensed).

3. That John Cox had prior arrests for marijuana and drug-paraphernalia offenses. *See id*. Even assuming *arguendo* that this vague information reveals a propensity to engage in drug dealing, it reveals nothing about sales of Roxicodone pills or involvement with youths in drug sales.

4. That the pills obtained during the search of the Cox residence were the same size and color purchased by the Confidential Informant. *See id*. While this evidence certainly would bolster a finding that

Joseph Cox was dealing in his father's prescription pills, it begs the critical questions of how the boy came by the pills and what, if anything, the father knew.

5. That Joseph Cox's statements about how and where his father kept the Oxycodone tablets conflicted with those of his father. *See id*. While this fact would permit a reasonable inference that either John Cox, his son or possibly both were being untruthful, the State Defendants offer no cogent argument as to how, in the context of the totality of the evidence then available, this fact tended to establish probable cause to believe that John Cox committed the crime for which he was arrested.

6. That Oxford District Attorney Beauchesne concluded that probable cause existed to arrest John Cox. *See id*. While this helps explain why Hainey concluded that probable cause existed, it is not itself a fact tending to establish the existence of probable cause.

At this stage of the proceedings, Hainey falls short of proving entitlement to qualified immunity with respect to the Plaintiff's federal constitutional claim of false arrest. He therefore is not entitled to summary judgment as to Counts IX and X.

The State Defendants finally move for summary judgment with respect to the Plaintiff's claim against Hainey for punitive damages. *See* Defendants' S/J Motion at 11; Complaint at 20. "[A] jury may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade,* 461 U.S. 30, 56 (1983). In this case, even viewing the record in the light most favorable to the Plaintiff, a reasonable trier of fact could not discern evil motive or intent or reckless indifference on Hainey's part to the Plaintiff's Fourth Amendment rights. The Plaintiff adduces evidence that for many years his family has felt harassed by local law enforcement; however, he sheds no light on how he has been harassed or whether MSP trooper Hainey had anything to do with such

harassment. Nor, despite a lack of probable cause for arrest, can a trooper who took the precaution of checking with the District Attorney reasonably be found to have been recklessly indifferent to its existence. Hainey accordingly is entitled to summary judgment as to punitive damages with respect to the federal false-arrest claim.

IV. Conclusion

For the foregoing reasons, I **GRANT** in part and **DENY** in part the State Defendants' motion to strike and recommend that their motion for summary judgment be **GRANTED** with respect to the MSP; **GRANTED** with respect to the DA's Office as to Counts IX and X and otherwise **DENIED**; and **GRANTED** with respect to Hainey as to Count VIII, and as to Counts IX and X to the extent they rely on Fifth Amendment, Eighth Amendment or malicious-prosecution causes of action and entail a claim for punitive damages, and otherwise **DENIED**. If this recommended decision is adopted, remaining for trial will be Counts III (malicious prosecution), V (IIED) and VII (NIED) as against the DA's Office, and Counts IX and X (federal constitutional and attorney-fee claims) as against Hainey with respect to a false-arrest cause of action only, and with no triable issue as to punitive damages.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 30th day of March, 2004.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

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